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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
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8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 EMILY LOUISE HERNANDEZ-

12 STEPNEY,

13 Defendant.
14

No. 1:14-cr-02100-SAB

No. 1:16-cv-03158-SAB

**ORDER RE DEFENDANT'S
28 U.S.C. § 2255 MOTION**

15 Before the Court is Defendant's Motion to Vacate, Set Aside, or Correct
16 Sentence Pursuant to 28 U.S.C. § 2255. ECF No. 101. This motion was heard
17 without oral argument and the Court did not order service on the United States
18 pursuant to 28 U.S.C. 2255(b) because "the files and the records of the case
19 conclusively show" that Defendant is not entitled to relief.

20 **BACKGROUND**

21 On May 7, 2015, Defendant pled guilty to Count 3 of the Indictment
22 pursuant to a Rule 11(c)(1)(C) plea agreement. ECF No. 49. She waived her
23 appeal rights and right to collaterally attack the conviction and sentence under
24 28 U.S.C § 2255, except for ineffective assistance of counsel claims based on facts
25 discovered after the plea and sentencing. ECF No. 49 at 11. The Court accepted
26 Defendant's guilty plea, finding that it was voluntary and not induced by fear,
27 coercion, or ignorance, and set a date for sentencing.

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1 On October 9, 2015, the Court entered judgment sentencing defendant to
2 120 months with credit for time served. ECF No. 86. Defendant filed a notice of
3 appeal on December 21, 2015. ECF No. 95. On April 19, 2016, the Ninth Circuit
4 Court of Appeals issued a mandate dismissing Defendant's appeal for failure to
5 prosecute. ECF No. 99. Defendant subsequently filed a motion to dismiss appeal
6 with this Court, which was dismissed as moot. ECF Nos. 100, 103. On September
7 1, 2016, Defendant filed a motion to vacate, set aside, or correct sentence under 28
8 U.S.C. § 2255, claiming her sentence should be vacated based on ineffective
9 assistance of counsel. ECF No. 101.

10 § 2255 STANDARD

11 Under 28 U.S.C. § 2255, a federal prisoner in custody under sentence may
12 move the court that imposed the sentence to vacate, set aside, or correct the
13 sentence on the ground that:

- 14 (1) the sentence was imposed in violation of the Constitution or laws
15 of the United States;
16 (2) the court was without jurisdiction to impose such sentence; or
17 (3) the sentence was in excess of the maximum authorized by law, or
18 is otherwise subject to collateral attack.

19 28 U.S.C. § 2255(a).

20 Pursuant to § 2255, the federal district court reviews the motion, attached
21 exhibits, and the record of prior proceedings to determine if these documents
22 "conclusively show that the prisoner is entitled to no relief." *Id.* If no relief is
23 available, the petition is dismissed; otherwise, "the court shall cause notice thereof
24 to be served upon the United States Attorney." *Id.* Rule 4(b), Rules Governing
25 Section 2255 Proceedings, provides that "[i]f it plainly appears from the face of
26 the motion and the prior proceedings in the case that the movant is not entitled to
27 relief," the court may dismiss a § 2255 petition summarily. "If the petition is not
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1 dismissed, the judge must order the respondent to file an answer, motion, or other
2 response within a fixed time, or to take other action the judge may order.” *Id.*

3 The harmless error review standard applies to § 2255 motions. *United States*
4 *v. Montalvo*, 331 F.3d 1052, 1057 (9th Cir. 2003) (holding that *Brecht*’s harmless
5 error standard applies to habeas cases under § 2255). Under *Brecht*, a
6 constitutional error does not require reversal of conviction unless the petitioner
7 can show that the error was of such magnitude as to have a substantial and
8 injurious effect or influence on the guilty plea or the jury’s verdict. *Brecht v.*
9 *Abrahamson*, 507 U.S. 619, 637 (1993).

10 ANALYSIS

11 Each of Defendant’s grounds for relief are framed as ineffective assistance
12 of counsel claims. In order to establish a claim for ineffective assistance of
13 counsel, Defendant must demonstrate that (1) counsel’s performance was deficient
14 and (2) that counsel’s deficient performance prejudiced the defense. *Strickland v.*
15 *Washington*, 466 U.S. 668, 687 (1984). *Strickland*’s first prong requires that a
16 “convicted defendant making a claim of ineffective assistance must identify the
17 acts or omissions of counsel that are alleged not to have been the result of
18 reasonable professional judgment.” *Id.* at 690. “At the same time, the court should
19 recognize that counsel is strongly presumed to have rendered adequate assistance
20 and made all significant decisions in the exercise of reasonable professional
21 judgment.” *Id.* In order to establish prejudice under the second prong of
22 *Strickland*, Defendant must “show that there is a reasonable probability that, but
23 for counsel’s unprofessional errors, the result of the proceeding would have been
24 different.” *Id.* at 694. The two-part *Strickland* test “applies to challenges to guilty
25 pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58
26 (1985). In this context, “the defendant must show that there is a reasonable
27 probability that, but for counsel’s errors, he would not have pleaded guilty and
28 would have insisted on going to trial.” *Id.* at 59.

1 Defendant's arguments that counsel's performance was deficient are
2 unpersuasive in light of the Rule 11(c)(1)(C) plea agreement. ECF No. 49.
3 Nonetheless, even had Defendant sufficiently alleged that counsel's performance
4 fell below an objective standard of reasonableness, Defendant has failed to allege
5 that she suffered any prejudice as a result of counsel's deficient performance.

6 In the context of ineffective assistance of counsel claims, the United States
7 Supreme Court has upheld denials of evidentiary hearings on habeas petitions on
8 the ground that the petitioner failed to specifically allege prejudice. *See Hill*, 474
9 U.S. 52. Thus, in order to demonstrate prejudice under *Strickland*, Defendant
10 must, at minimum, allege "that there is a reasonable probability that, but for
11 counsel's unprofessional errors, the result of the proceeding would have been
12 different." 466 U.S. at 694. In the context of her guilty plea, Defendant must
13 establish that there is a "reasonable probability" that she "would not have pleaded
14 guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

15 Nowhere in Defendant's Petition does she allege that the outcome of the
16 proceedings against her would have been different but for counsel's alleged errors.
17 Indeed, the Petition is devoid of allegations that Defendant would not have entered
18 a guilty plea but for counsel's alleged erroneous advice or that Defendant would
19 have received a lesser sentence but for counsel's various alleged errors. Because
20 "it plainly appears from the face of the motion and the prior proceedings in the
21 case that the movant is not entitled to relief," Rule 4(b), Rules Governing Section
22 2255 Proceedings, Defendant's motion to vacate sentence is denied.

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant
3 to 28 U.S.C. § 2255, ECF No. 101, is **DENIED**.

4 The District Court Clerk is hereby directed to enter this order and provide
5 copies to counsel and the Defendant.

6 **DATED** this 28th day of October 2016.



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12 Stanley A. Bastian
13 United States District Judge
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